

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORMEL SIRSEAN JACKSON,

Defendant-Appellant.

UNPUBLISHED

March 8, 2005

No. 249615

Wayne Circuit Court

LC No. 03-001399-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of 1 month to 20 years for the cocaine conviction and 1 month to 4 years for the marijuana conviction. Defendant also received a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the prosecutor denied him his right to a fair trial by engaging in misconduct when making certain statements during rebuttal closing argument. Because defendant failed to preserve this issue, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If a plain, i.e., clear or obvious, error is established, reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

Defendant's argument focuses on the following remarks made by the prosecutor:

Well, and then to say you – you say that it was snowing outside and this guy road [sic] up on a bike, didn't he have trouble riding his bike. I thought you said that you didn't dispute the first transaction which involved the white male on the bike. Didn't you just say that you have no dispute with that, that that first transaction occurred but now you're questioning it. Why are you doing that. Because he's trying to confuse you.

* * *

And I submit to you that your only responsibility is to judge the weight of evidence in this case. I trust that you'll do that.

Albert Einstein once said the world is a dangerous place, not because of the people in it that do evil but because of those that standby [sic] and let it happen. Ladies and gentlemen, now that this case has been proven to you beyond a reasonable doubt I trust you're not going to standby [sic] and let this happen.

Defendant asserts that the first portion of the remarks constituted an improper accusation of misrepresentation by defense counsel and that the second constituted an improper civic duty appeal. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

In context, it is clear that the first portion of the remarks was made in response to defense counsel's closing argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In his closing, defense counsel indicated that defendant was not challenging that the first of three drug transactions testified to by the police had actually occurred. However, counsel also pointed to testimony about the circumstances of that transaction to support his argument that the evidence against defendant had been fabricated. In rebuttal, the prosecutor was simply pointing out the inconsistencies between these two positions.

As for the other challenged remarks, we note that the prosecutor explicitly framed his argument in the context of the evidence introduced in this case, mentioned that the case "has been proven to you beyond a reasonable doubt," and asked the jury to find defendant guilty on the basis of the evidence. A prosecutor does not err when he argues the evidence and the reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, a prosecutor is not required to use only bland language when making an argument. *People v Aldrich*, 101, 112; 631 NW2d 67 (2001).

Because, in context, the challenged remarks were not improper, defendant has failed to establish plain error affecting substantial rights. *Carines, supra* at 763. Defendant also argues that he was denied the effective assistance of counsel when defense counsel failed to raise an objection to the challenged remarks. However, because counsel is not required to advocate a meritless position, *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003), the failure to object in this case cannot form the basis of a claim of ineffective assistance.

Defendant also argues that defense counsel was ineffective because he failed to introduce photographs of the crime scene and failed to interview or call defendant's aunt as a witness. We disagree. A defendant raising an ineffective assistance claim bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich

298, 308-309; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial. *Strickland*, *supra* at 687; *Pickens*, *supra* at 312-313. The defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional error or errors, the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

The photographs allegedly would have shown that a wooden fence would have obstructed the police from observing certain events testified about at trial. Decisions regarding which evidence to present are presumed to be matters of trial strategy that this Court will not second-guess on appeal. *People v Rockey*, 237 Mich.App 74, 76; 601 NW2d 887 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). At an evidentiary hearing, defendant's trial counsel testified that he at first intended to introduce the photographs. However, he changed his mind after defendant told him that defendant had been selling drugs and that a number of transactions had taken place both in front of and behind the fence.¹ Counsel testified:

My concern was I will get up with a bunch of these pictures and it would look bad in front of the jury. I'd asked him a question, where do these narcotics transactions take place, and the officer would point out in front of the fence which would concur with what Mr. Jackson told me.

Under these circumstances, and deferring to the hearing court's superior ability to appraise witness credibility, *People v Carter*, 197 Mich App 550, 560; 496 NW2d 336 (1992), we conclude that defendant has failed to overcome the presumption that trial counsel's decision not to introduce the photographs, as well as testimony concerning how long the fence had been in place, constituted sound trial strategy, which we will not second-guess with the benefit of hindsight. *Rockey*, *supra* at 76; *Rice*, *supra* at 445.

We also find no merit to defendant's claim predicated on counsel's failure to call defendant's aunt as a witness. Significantly, defense counsel testified that defendant never informed him that defendant's aunt was a useful potential witness. Defendant testified, however, that he had done so. Defendant's aunt testified that she never made any attempt to contact defense counsel. Moreover, counsel's testimony shows that he made significant attempts to try and locate and interview witnesses that would be helpful to defendant's case. See *Strickland*, *supra* at 691. Again deferring to the hearing court's ability to assess credibility, *Carter*, *supra* at 560, we conclude that defendant has failed to show that counsel was ineffective for failing to interview or call defendant's aunt to testify or to provide the testimony of defendant's mother regarding the time that the aunt arrived at the location in question.

Defendant also argues that the trial court abused its discretion and violated defendant's right to present a defense when it barred him on hearsay grounds from cross-examining a police officer regarding an interrogation report prepared by that officer. See *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998) (setting forth the standard of review for evidentiary issues). We

¹ Defendant denied that he told trial counsel he sold drugs on the day he was arrested.

agree that the trial court abused its discretion but find that reversal based on this error is not required.

During cross-examination of the officer, defendant sought to introduce evidence that when filling out the report before interrogating defendant, the officer had left blank areas provided for listing the types of drugs possessed and sold. We do not believe this evidence constituted an assertion for purposes of the hearsay rule, MRE 801(a)(2), nor do we believe that defendant was seeking to introduce this evidence to prove the truth of the matter asserted, MRE 801(c).² Nonetheless, reversal is not required because this error was harmless in light of the weight of the evidence actually introduced and in light of the fact that defense counsel cross-examined the officer extensively through other means. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant has also asserted that by barring him from introducing this evidence, the trial court denied him his constitutional right to present a defense. However, the trial court barred defendant only from impeaching the officer's credibility through the use of the interrogation report. It did not bar defendant from impeaching his credibility through other means. Indeed, defendant successfully introduced evidence showing several inconsistencies in the officer's testimony. Accordingly, we find no plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Finally, defendant argues that the cumulative errors made in this case denied him his constitutional right to a fair trial. Again, we disagree. This Court reviews a cumulative error claim "to determine if the combination of alleged errors denied defendant a fair trial." *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). As set forth above, the only error that occurred was harmless.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello

² Defendant's entire cross-examination of the officer consisted of examining alleged inconsistencies in the officer's testimony. Under these circumstances, we believe that the evidence could have been introduced, as defendant claims, to impeach the officer's credibility.